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Supreme Court of the United States

OCTOBER TERM, 1966

No. 498

SAMUEL MOSLEY,

Respondent,

against

CIA. MAR. ADRA S.A.,

Respondent,

against

LIPSETT STEEL PRODUCTS, INC.,

Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT ON BEHALF OF LIPSETT STEEL PRODUCTS, INC.

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TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner Lipsett Steel Products Inc., prays that a writ of certiorari be issued to review the decision and judgment of the United States Court of Appeals for the Second Circuit filed June 16, 1966 and the orders denying a petition for rehearing and rehearing in banc, filed July 22, 1966 affirming judgments entered in the United States District Court for the Southern District of New York, the first in favor of the respondent longshoreman Samuel Mosley for personal injuries against the respondent shipowner Cia Mar Adra S. A., in the sum of $125,000 entered January 28, 1966 on a general jury verdict and the second in favor of respondent Cia Mar Adra S. A. against

the stevedore petitioner, Lipsett Steel Products Inc., in the sum of $125,000 for indemnity entered January 28, 1966 in accordance with the memorandum opinion dated January 27, 1966 of District Judge Lloyd McMahon granting the motion of Cia Mar Adra S. A. for judgment notwithstanding the verdict of the jury.

The opinion of District Judge McMahon granting judgment n.o.v. against petitioner on the ground "that the verdict in its favor is against the weight of the evidence" is included in the appendix to this petition. The opinion of Judge Paul R. Hays of the United States Court of Appeals speaking for the majority, as well as the dissenting opinion of Judge Henry J. Friendly are reported at 362 Fed. 2d 118 and is included in the appendix to this petition (A, pp. 18 and 26, respectively).

Judgments entered after a prior trial of this case were reversed and the case was remanded for a new trial by the Court of Appeals, the opinions appearing in 314 F. 2d 223. Certiorari was denied 375 U. S. 829.

At the second trial the shipowner's liability for unseaworthiness alone was litigated, inasmuch as the claim based on negligence already had been dismissed.

No special questions were given to the jury in the instant trial and it returned general verdicts in favor of the longshoreman against the shipowner and in favor of the stevedore against the shipowner on indemnity.

Jurisdiction

Jurisdiction to review the judgments by writ of certiorari is found in 28 U.S.C. 1254 (1) and 2101 (c), as well as rule 19 (1b) of this court.

Questions Presented for Review

I

Is it not contrary to the Seventh Amendment for:

a—A trial court to grant judgment n.o.v. against a party on the stated ground "that the verdict in its favor is against the weight of the evidence" and on a finding of fact directly contrary to the jury's finding on the same fact?

b—The Court of Appeals in affirming, to quote and rely on the trial court's abortive finding of fact?

c—The Courts below to dispense with a motion for a directed verdict as a prerequisite to judgment n.o.v.?

II

Is not the shipowner precluded from indemnity where the jury was charged that it could find unseaworthiness because of:

"the type of operation that was going on" and "the condition of the deck",

an activity and a result required of the petitioning stevedore?

III

In charging a jury as to unseaworthiness:

a. Should the negligence concept of "safe place to work" be equated with "fitness for intended use" so that a shipowner has an absolute duty to provide a longshoreman "a safe place to work"?

b. Is it correct to say that a shipowner owes to a longshoreman who is loading scrap iron, an absolute duty to provide and maintain the place of loading so that the longshoreman may "perform his work in the task assigned to him in reasonable safety"?

c. Is it proper to say that a ship not only must be reasonably fit but that also and in addition, the area where a stevedore is loading scrap iron must be reasonably safe under all the circumstances and all the conditions encountered during such loading, including the loading itself?

IV

Does judgment against a shipowner which results from a faulty and improper charge as to unseaworthiness, furnish a proper base on which to rest indemnity over against a stevedore?

Statement of the Case

Samuel Mosley, plaintiff below, and a citizen of New Jersey brought suit in the United States District Court for the Southern District of New York against Cia Mar Adra S. A., a Liberian corporation, to recover damages for injuries allegedly sustained by him on the SS Turmoil owned by Cia Mar Adra S. A. while he was working as a longshoreman in the employ of petitioner Lipsett Steel Products, Inc., a New York corporation. Jurisdiction was invoked under 28 U.S.C. 1332. Cia Mar Adra S. A. filed a third-party complaint against petitioner in which indemnity was sought. Plaintiff's claim based on alleged unseaworthiness of the vessel was submitted to the jury (his claim of negligence was dismissed on an earlier trial) and the jury returned a verdict in plaintiff's favor of $125,000 against Cia Mar Adra S. A. On the indemnity claim of Cia Mar

Adra S. A. the jury returned a verdict in favor of the petitioner, Lipsett.

Stationed in the tween deck of No. 5 hold of the ship, into which scrap iron was being loaded by use of a chute, Mosley noted that the chute had become jammed by an automobile rear end. In attempting to free the jammed rear end he claims that he injured cervical vertebrae 5 and 6.

Using a six feet long metal bar with a hook on the end, he tried to pull the heavy automobile rear end over the side of the chute which was 2½ to 3 feet deep. He used all his strength and weight and because of the position and height of the automobile rear end in the chute, he had to pull with his hands elevated to eye level. Scrap metal was being loaded all over the deck of the tween deck where the longshoreman was. Mosley admitted that he knew he was standing on scrap metal when he pulled and tried to dislodge the rear end. He made no effort to clear away any of the scrap in order to give himself good footing. As he continued to pull with all his strength and weight his feet slipped and he fell backwards. He complained of pain in his leg. For the balance of the day he remained on the ship which was moored to a dock. On the following two days he went to meetings and returned to his regular work on the third day. For at least four months after this occurrence he performed his regular longshoreman's work. Six months after the instant occurrence, operative intervention revealed a ventral herniated disc C5—C6.

In 1933 the plaintiff longshoreman had been knocked unconscious when he was in the hold of a ship and a load of lumber fell on him, striking his head, neck, shoulders and other parts of his body. Taken by ambulance he was confined in a hospital for 19 days on that occasion. His own doctor admitted at the instant trial that a herniated disc could take many years to develop or many

years to evidence itself, and it could be present and never reveal itself.

According to the proof herein, no defect or unfitness in the hull, gear, machinery, or appurtenances of the ship directly visited harm on the plaintiff longshoreman. If he sustained injury at the time complained of, the proof clearly demonstrated that it was brought about by what he himself did and how he did it. As he pulled with all his might and weight against an immovable force, something had to give. Thus the manner in which the claimed injury allegedly was sustained excluded the possibility that unseaworthiness played any part in it until the Court charged the jury:

> "The law requires, the maritime law, that the owner of a vessel maintain it in a seaworthy condition."
>
> • • •
>
> "Specifically here the question which you have to decide is whether under all the circumstances the tween deck area was reasonably fit to permit the plaintiff to perform his work with reasonable safety. And here you have to take into consideration all of the conditions then obtaining, the type of operation that was going on, the lighting conditions, the chute, the kind of chute it was, the condition of the deck.
>
> • • •
>
> But consider all the conditions and whether under all of those conditions that area was reasonably fit for the plaintiff to perform his work in the task assigned to him with reasonable safety.
>
> • • •
>
> On the other hand, if you find it was unfit, that it was not reasonably fit and reasonably safe, then you should find that it was unseaworthy • • •."

Exception was taken to the charge on the ground that the negligence doctrine of safe place to work was foreign to the seaworthiness concept—"it is the fitness of the vessel itself for its intended use which is seaworthiness not conditions generally".

In charging the jury on indemnity the court specifically charged:

> "If the stevedores created an unseaworthy condition * * * the ship in that situation can recover over against the stevedores for all the loss and damages to which it has been put."

The jury verdict in favor of the stevdore was its answer to this question. But in setting aside the jury verdict in favor of the stevedore on indemnity and granting judgment n.o.v. the court expressly held:

> "Here there is no question but that any unseaworthy condition obtaining in the tween deck area was created by the stevedore and that the verdict in its favor is against the weight of the evidence." (Appendix B, p. 30)

The majority opinion of the Court of Appeals quotes and rests on this finding of fact of the trial court, even though it is contrary to the jury's finding (Appendix A, p. 25).

Testimony from the longshoreman plaintiff, as well as from the ship's chief mate, clearly established that the ship's officers exercised a continuous and regular supervision and control over the loading. Ship's officers regularly were present "to see that the ship was trimmed properly" and to protect against damage. After the chute was positioned, "a position run" always was made in the presence of an officer of the ship.

The petitioner admitted in its answer to the third party complaint that it had contracted to load the ship with scrap

iron. Cia Mar Adra S. A. the shipowner, however did not prove any of the terms of the contract nor did it prove what the petitioner was required to do in order to render workmanlike service. After all the evidence was in the court said:

> "I don't remember any proof about performance under the contract at the moment that I recall. Just a moment.
>
> Do you have any evidence here on the third-party situation, Mr. Cichanowicz, other than the fact that the stevedore was on board and performed the work. You have that, but what else?
>
> • • • • • •
>
> All right, it is your case, not mine. If you haven't enough it is going to be your tough luck."

In the court's post trial memorandum granting judgment n.o.v., filed a month after the conclusion of the trial and without the benefit of a transcript of any of the testimony according to the shipowner's brief, the court clearly demonstrates that it is unable to determine the basis on which the jury held that the ship was unseaworthy. The court concedes that the jury might have found the vessel to be unseaworthy from any one or a combination of a number of elements, but which one or how many the court cannot say. Thus the court confesses that it has absolutely no idea of what condition or conditions, what circumstance or circumstances were rested on by the jury in rendering a verdict for the plaintiff longshoreman (Appendix B, p. 29).

At the conclusion of all the evidence, the shipowner did not make a motion for a directed verdict as to the third party complaint nor did it "state the specific grounds therefor" as required by F.R.C.P. Rule 50 a & b. The only motion for a directed verdict which the shipowner made was expressly directed to the plaintiff's complaint

and that motion plainly stated "the evidence is insufficient on which to go to the jury." That motion is quoted by the Court of Appeals (Appendix A, p. 24). Thus an affirmative judgment against the stevedore for $125,000 is made to rest on "insufficiency of evidence". Not a word was said by the shipowner at the conclusion of the evidence which asked for a directed verdict and a money judgment against the stevedore on the third-party complaint. Even if the plaintiff's complaint had been dismissed for lack of proof or otherwise, the shipowner could have sought judgment on the third party complaint against the stevedore under recent decisions of the 2nd Circuit. *Damanti* v. *a/s Inger*, 314 F. 2d 395, cert. den. 375 U. S. 884, *Massa* v. *C. A. Venezuelan Navigacion and John W. McGrath Corp.*, 332 F. 2d 779.

Reasons for Granting the Writ

The decision below can not escape having a tremendous effect on any jury trial which hereafter may occur as well as to add to the constantly mounting confusion, as evidenced by reported decisions, as to what constitutes unseaworthiness. Lawyers and judges, could point to this case to demonstrate how far a trial court may go in substituting its judgment of the facts for the judgment of the jury. Again they may point to this case as demonstrating that the requirements of the Common Law and of F.R.C.P. Rule 50 a & b, involve provisions which may be dispensed with in the discretion of the court. Still further, this case may be relied on to demonstrate that in suits of longshoremen injured on shipboard which constitute such a large bulk of the litigation in our Federal Courts, the maritime law as to what constitutes unseaworthiness, is not limited or defined by decisions of this court, but that it is subject to unlimited enlargement in scope by the several trial courts and Courts of Appeals throughout the country.

I

Judgment n.o.v. never may be granted on "Weight of the evidence". A new trial may be. *Montgomery Ward v. Duncan*, 311 U. S. 243 at 249.

When the trial court granted judgment "on the ground that the verdict in its favor is against the weight of the evidence", it was an improper usurpation of the function of the jury. *Berner* v. *British Commonwealth Pacific Airlines Ltd.* (CA2), 346 F. 2d 532 at 536, *Tennant* v. *Peoria & Pekin Union R. Co.*, 321 U. S. 29 at p. 35; *Lavender* v. *Kurn*, 327 U. S. 645 at 653; *Dick* v. *New York Life Ins. Co.*, 359 U. S. 437; *Mercer* v. *Thierot*, 377 U. S. 152.

The trial court confesses it does not know on what bases the jury found the ship to be unseaworthy, the jury was not asked to answer special questions and there is no way of knowing what inferences the jury drew from any of the testimony, either as to the ship's liability or on indemnity.

The testimony established that the stevedore was required to load the scrap all over on the deck of the tween deck, and the jury was justified in concluding that the scrap on which the longshoreman was standing and on which his feet slipped when he was pulling, was not an unseaworthy condition "created by the stevedore". The doubt expressed by the trial court at the trial as to whether the claim for indemnity had been proved, the constant supervision of loading by the ships personnel and our utter ignorance as to the basis on which the jury found the vessel to be unseaworthy emphasizes the conflict with this court's language in *Atlantic and Gulf Stevedores, Inc.* v. *Ellerman Lines, Ltd.*, 369 U. S. 355 at 364:

> "For a search for one possible view of the case which will make the jury's finding inconsistent results in a collision with the Seventh Amendment."

The instant decision is in conflict with the decision of the Fifth Circuit in *Waterman SS Corp.* v. *David,* 353 F. 2d 660 wherein this court denied certiorari June 6, 1966.

Rule 50a requires a movant for a directed verdict to

"state the specific grounds therefor".

The shipowner's motion addressed to plaintiff's complaint, quoted by the Court of Appeals* and branded as "ambiguous", sought a direction on grounds directly opposed to those on which a direction as to the third party complaint would have been requested and which in fact was the basis for the trial court granting judgment n.o.v. As to the plaintiff's complaint, the shipowner claimed an "insufficiency" of evidence (Appendix, p. 24). As to indemnity, the trial court held it had been proved by the "weight of the evidence" (Appendix, p. 30).

The statement of the Court of Appeals (Appendix A, p. 25) that the requirement of Rule 50b is "harsh in any circumstances" and the action of the Court of Appeals herein can not be reconciled with this Court's language in *Johnson* v. *N. Y., N. H. & H. R. Co.,* 344 U. S. 48 at 52:

> "Rule 50b was designed to provide a precise plan to end the prevailing confusion about directed verdicts and motions for judgments not withstanding verdicts."

The language and action of the Court of Appeals suggests that it is preempting a rule making power which has not been vested in it.

The requirement in Rule 50b that a motion be made for a directed verdict as a prelude to judgment n.o.v., is no innovation. It was the rule before Rule 50b was enacted.

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* The Court of Appeals inverts the correct order of the motions made.

It did not impose a new condition. It was part of the common law rule. It can not be dispensed with.

> *Baltimore & C. Line* v. *Redman*, 295 U. S. 654 at 660 (1935).

Since the Seventh Amendment forbids reexamination of the facts in a case, except according to common law principles, and since the necessity of a motion for a directed verdict existed under the common law, *Baltimore & C. Line* v. *Redman, supra* it matters little whether we feel that Rule 50b is "harsh in any circumstances". A motion for a directed verdict does not involve a question of preserving a party's "right to make an n.o.v. motion" as the Court of Appeals said it did (Appendix A, p. 25). Such a motion, instead confers jurisdiction on the Court to rule on n.o.v. after the jury returns its verdict. *Baltimore & Carolina Line* v. *Redman, supra.* Failure to make such a motion deprives the Court of jurisdiction to rule on n.o.v.

The Fifth Circuit recently said (May 17, 1966) in *Pennsylvania National Mutual Casualty Ins. Co.* v. *Nathan*, 361 F. 2d 18 at 20:

> "As we have said time and again, 'When a party allows a case to go to the jury without challenging the sufficiency of the evidence by a motion for a directed verdict, the appellate court is powerless to review the sufficiency of the evidence to support the verdict'."

II

Considerable confusion and doubt has arisen as to the proper meaning and application of this court's language in *Weyerhaeuser SS Co.* v. *Nacirema Operating Co.*, 355 U. S. 563, when it said at p. 567, that the shipowner

> "was entitled to indemnity absent conduct on its part sufficient to preclude recovery."

When the jury herein was told that it could find the vessel unseaworthy because of "the type of operation that was going on" and "the condition of the deck," it was in effect told that what the shipowner required petitioner to do, namely to load scrap and to load the scrap on the deck, could render the ship unseaworthy.

If unseaworthiness could be found on this basis, does not this preclude indemnity since the stevedore was required by the shipowners to do exactly what it did. Is this not indemnity precluding conduct under the Weyerhaeuser doctrine?

III

What constitutes unseaworthiness and what is the proper application of the rule are matters as to which there is increasing disagreement and confusion of late. The First and Sixth Circuits, as well as a substantial portion of the Second Circuit adhere to the rule that segments of the vessel itself must be defective or unfit to render her unseaworthy and that neither conditions generally, nor an unsafe place to work, come into play in unseaworthiness. *Arena* v. *Luckenbach SS Co.* (CA 1), 279 F. 2d 186, cert. den. 364 U. S. 895; *McKnight* v. *N. M. Patterson & Sons* (CA 6), 286 F. 2d 250, cert. den. 368 U. S. 913; *Waldron* v. *Moore-McCormack Lines* (CA 2), 356 F. 2d 247, January, 1966. Directly opposed are the Third, Fourth and Ninth Circuits. *Spann* v. *Lauritzen* (CA 3), 344 F. 2d 204, at 209, cert. den. 382 U. S. 1000; *Huff* v. *Matson Navigation Co.* (CA 9), 338 F. 2d 205 at 212, cert. den. 380 U. S. 943; *Ballwanz* v. *Isthmian Lines, Inc.* (CA 4), 319 F. 2d 457.

The Fifth Circuit has expressed conflicting views—*McQuiston* v. *Freighter & Tankers SS Co.*, 327 F. 2d 746, *Mills* v. *Mitsubishi Shipping Co.*, 358 F. 2d 609. Petition for certiorari filed July 18, 1966.

The disagreement among the several judges of the Second Circuit Court of Appeals is sharp and apparently

irreconcilable: On January 31, 1966 in *Waldron* v. *Moore-McCormack Lines*, 356 F. 2d 247, at p. 251, Judges Medina and Lumbard refused to hold "that any condition aboard ship that is of potential danger * * * is necessarily a condition of unseaworthiness * * *." Judge Smith dissented. Petition for certiorari was filed June 15, 1966. On March 31, 1966 in *Skibinski* v. *Waterman SS Corp.*, 360 F. 2d 539, Judges Hays and Dooling rejected recent decisions of the same court and Judge Friendly dissented. Petition for certiorari was filed July 22, 1966. On June 16, 1966 (herein) in *Mosley* v. *Cia Mar Adra S A and Lipsett Steel Products* —— F. 2d —— Judges Hays and Feinberg held that a shipowner *warrants* to a longshoreman "a safe place" to work (Appendix A, p. 23) and that conditions generally may render a vessel unseaworthy. Judge Friendly dissented. On July 18, 1966 in *Radovich* v. *Cunard SS Co.*, —— F. 2d ——, Judges Feinberg and Smith imposed liability on a ship for unseaworthiness because a stevedore had "created a dangerous condition." Judge Irving Kaufman dissented and termed the majority's distinctions "words and phrases that are like beads of quicksilver." What is said in *Skibinski, Mosley* (instant case) and *Radovich* has completely emasculated *Puddu* v. *Royal Netherlands SS Co.*, CA 2, decided en banc in 1962, 303 F. 2d 752, cert. den. 371 U. S. 840 reh. den. 371 U. S. 917.

The instant case pointedly presents the very issue about which there is so much disagreement, namely whether a shipowner warrants to a longshoreman a safe place to work and whether circumstances and conditions generally may be used by a jury as a basis for holding a vessel to be unseaworthy.

The decisions of this Court, although not passing directly on the point, seem to indicate that "safe place to work", a negligence doctrine, has no proper place in considering seaworthiness. *M. V. Tungus* v. *Skovgaard*, 1959, 358 U. S. 588 at 594; *West* v. *U. S.*, 1959, 361 U. S. 118 at 122-

123; *Morales* v. *City of Galveston*, 370 U. S. 165 at 170 and 171.

In *Mitchell* v. *Trawler Racer, Inc.*, 362 U. S. 539 at 550, this court pointed out:

> "What has evolved is a complete divorcement of unseaworthiness liability from concepts of negligence."

Never, has this Court held that seaworthiness depends on "all the circumstances *** all the conditions" or on whether "the area was reasonably fit for the plaintiff to perform his work in the task assigned to him with reasonable safety". No decision by this Court has held that a vessel, in addition to being reasonably fit, must also be reasonably safe in order to be seaworthy, which was the charge given to the jury herein.

It seems that a misunderstanding of the language in this court's opinion in *Mitchell* v. *Trawler Racer, Inc.*, 362 U. S. 539, has given rise to erroneous statements as to what constitutes unseaworthiness. The basic holding of that case, that notice of unseaworthiness is not an essential to liability, is well understood, but the references to "unseaworthy condition" (549) and "transitory unseaworthiness" (542) seem to be given a meaning which never was intended. Taken in the context in which these phrases are found, they relate to a specifiic part of the ship, the rail, which may have been rendered unfit by the presence of slime and fish gurry. Taken out of context, they are improperly used as a basis for the court's charge herein:

> "but consider all the conditions and decide whether under all of those conditions that area was reasonably fit for the plaintiff to perform his work in the task assigned to him with reasonable safety."

If any of the grounds on which a case is submitted to a jury are found inadequate as a matter of law, the judgment must necessarily be reversed since

> "there is no way to know that the invalid claim of unseaworthiness was not the sole basis for the verdict."

United N. Y. & N. J. S. H. Pilots Asso. v. *Halecki*, 358 U. S. 613, at p. 619.

The basic concept of unseaworthiness as set forth in *The Osceola*, 189 U. S. 158 and *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85, and reiterated in *Gutierrez* v. *Waterman SS Corp.*, 373 U. S. 206, has not changed, although decisions currently being rendered including the instant one, indicate that it has.

We find the Fourth Circuit saying in *Scott* v. *Isbrandtsen Company* (CA 4), 327 F. 2d 113 at 124:

> "The obvious trend of the Supreme Court decisions is toward providing ever increasing protection for crewmen, longshoremen and even others employed by independent contractors who may be called upon to work aboard vessels."

Ferrante v. *Swedish American Lines*, (CA3) 331 F. 2d 571 at 578; and *Deffes* v. *Federal Barge Lines, Inc.*, (CA5) 361 F. 2d 422 at 425 are to like effect. These cases draw no distinction between broadening the area to which the unseaworthiness doctrine applies and changing the basic rule as to what constitutes unseaworthiness. They suggest that both have been or soon will be accomplished. The instant case clearly works a change in the basic rule as to what constitutes unseaworthiness and thus emphasizes the need for clarification of the rule.

IV

Weyerhaeuser SS Co. v. *Nacirema Operating Co.*, 355 U. S. 563 at 567, provides that if a stevedore renders a substandard performance "which led to foreseeable liability" of the shipowner, the stevedore may be cast in liability for indemnity. Thus legal liability of the shipowner would seem to be a necessary prerequisite to his

obtaining indemnity. To grant a shipowner indemnity without first establishing his legal liability, would seem to make the indemnitor an insurer and not to be in accord with *Weyerhaeuser SS Co.* v. *Nacirema Corp.* The Second Circuit however has dispensed with legal liability as a necessary prerequisite to indemnity in

> *Massa* v. *C. A. Venezuelan Navigation and John W. McGrath Corp.*, 332 F. 2d 779 at 782;
> *Paliaga* v. *Luckenbach S.S. Co.*, 301 F. 2d 403.

Whether these cases are distinguishable and whether they are decided correctly, there remains the unanswered question as to whether indemnity can be bottomed on a judgment against a shipowner which stems from an erroneous charge as to unseaworthiness.

CONCLUSION

Reason and the cases cited above, unequivocally support petitioner's contention that compelling need exists for this learned court to define the law as to judgments n.o.v. and Rule 50 F.R.C.P. for the guidance of all in the conduct of future civil jury trials and as to unseaworthiness and indemnity in the interest of uniformity and justice.

Dated: New York, N. Y., August 23, 1966.

Respectfully submitted,

EDMUND F. LAMB,
Attorney for Petitioner.

VINCENT A. CATOGGIO,
On Petition.

APPENDIX

A.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 386—September Term, 1965.

(Argued May 25, 1966 Decided June 16, 1966.)

Docket No. 30372

SAMUEL MOSLEY,

Plaintiff-Appellee,

—v.—

CIA. MAR. ADRA S.A.,

Defendant-Appellant and Third-Party Plaintiff-Appellee,

—v.—

LIPSETT STEEL PRODUCTS, INC.,

Third-Party Defendant-Appellant.

Before:

FRIENDLY, HAYS and FEINBERG,

Circuit Judges.

Appeal from a judgment of the United States District Court for the Southern District of New York, Lloyd F. MacMahon, *Judge,* based upon the verdict of a jury awarding damages to plaintiff for injury resulting from a breach of the shipowner's warranty of seawothiness, and from a

judgment notwithstanding the verdict in favor of the shipowner against the third-party defendant, plaintiff's employer, on the issue of indemnity.

Affirmed.

GEORGE J. ENGELMAN, New York, N. Y. (Gay & Behrens, New York, N. Y., of counsel), *for Plaintiff, Mosley.*

VICTOR S. CICHANOWICZ, New York, N. Y. (William P. Larsen, and Cichanowicz & Callan, New York, N. Y., of counsel), *for Defendant, Cia. Mar. Adra S.A.*

VINCENT A. CATOGGIO, New York, N. Y. (Purdy, Lamb & Catoggio, New York, N. Y., on the brief), *for Third-Party Defendant, Lipsett Steel Products, Inc.*

HAYS, *Circuit Judge:*

Plaintiff Mosley, a longshoreman in the employ of a stevedore company, Lipsett Steel Products, Inc., the third-party defendant, was injured while loading scrap metal on the *S.S. Turmoil,* a vessel owned and operated by Cia. Mar. Adra S.A., the defendant. This is an appeal by the shipowner from a judgment of $125,000 entered in the United States District Court for the Southern District of New York, in favor of Mosley for injury resulting from a breach of the shipowner's warranty of seaworthiness. The stevedore company appeals from a judgment notwithstanding the verdict in favor of the shipowner, on the issue of indemnity. We affirm on both appeals.

This case is before us for a second time, having been reversed and remanded for a new trial on a previous ap-

peal because it was impossible to ascertain whether the general verdict for plaintiff was based on a permissible ground, a finding that there was insufficient lighting, or on an impermissible ground, the use of a hook which was not shown to be an appurtenance of the ship or unfit for its intended use. See *Mosley* v. *Cia. Mar. Adra, S.A.*, 314 F. 2d 223 (2d Cir.), cert. denied, 375 U. S. 829 (1963).

I.

There is evidence in the record to support the conclusion that the injury to Mosley occurred in the following way.

On October 8, 1956 the *S.S. Turmoil* began loading a cargo of scrap metal at the Port of Newark. Mosley was part of a gang assigned to load scrap into the 'tween deck of the #5 hatch. Mosley's job was to direct the placing of metal scrap which a crane dumped down a chute. When one part of the 'tween deck became filled, he would direct the chute toward another area in order to assure an even distribution of the cargo. The chute, forty feet long and three to five feet wide at top, tapering to the bottom, was suspended in the hatch from the cargo runners of the ship by means of bridles and shackles.

At the close of the workday on October 14, the day before the accident, a load of scrap metal had been placed in the square of the hatch of the 'tween deck to a height of three-and-a-half or four feet, partially blocking the entry of natural light.

The next morning, after Mosley had been at work about an hour and a half, "a piece of transmission or the rear end of a car" became lodged in the tapered end of the chute, about three feet from the mouth and blocked the flow of scrap.

A.

Mosley, who was working alone on the 'tween deck, told the foreman to suspend the loading. He approached to within four or five feet of the chute, intending to use an "improvised hook" five or six feet in length, to dislodge the metal. He positioned himself "as best as I possibly could" on a deck littered with irregular pieces of scrap. While he was attempting to remove the obstruction, the scrap under Mosley's feet gave way; he fell and was injured.

The trial judge charged the jury:

> "Specifically here the question which you have to decide is whether under all the circumstances the tween deck area was reasonably fit to permit the plaintiff to perform his work with reasonable safety. And here you have to take into consideration all of the conditions then obtaining, the type of operation that was going on, the lighting conditions, the chute, the kind of chute it was, the condition of the deck.
>
> • • • • • •
>
> But consider all the conditions and decide whether under all of those conditions that area was reasonably fit for the plaintiff to perform his work in the task assigned to him with reasonable safety."

The defendant shipowner argues that this charge permitted the jury to consider "grounds which were not established by the evidence." But the evidence on each point mentioned in the charge need not be weighed separately. Mosley's contention, and the theory on which the case was submitted to the jury, was that the various factors mentioned each contributed to the unseaworthiness of the 'tween deck area, i.e., rendered it unsuitable for the use to which it was put.

A.

In *Krey* v. *United States*, 123 F. 2d 1008, 1010 (2d Cir. 1941) this court, referring to a number of separate factors which, it was charged, resulted in the unseaworthiness of an area of the ship, held that:

> "*these factors combined* seem to us clearly to establsih an unseaworthy condition." (Emphasis added.)

Here, the chute was specifically put in place to receive the cargo of metal scrap. It was an appurtenance of the ship. Plaintiff presented evidence that because of the tapered nature of the chute, and the diverse sizes and shapes of the metal scrap, obstructions were bound to occur. "The vessel's duty to furnish seamen with tools reasonably fit for their intended use is absolute." *Michalic* v. *Cleveland Tankers, Inc.*, 364 U. S. 325, 327 (1960).

The 'tween deck was littered with irregular pieces of metal scrap. The chief officer of the *S.S. Turmoil* testified that he refused to enter the 'tween deck area during loading because it was "dangerous"; scrap would "fall off" the chute; it "bounces" and "ricochets around." This situation when combined with lack of adequate lighting resulted in unseaworthiness. See *Ross* v. *S.S. Zeeland*, 240 F. 2d 820, 822-23 (4th Cir. 1957). There was more than enough evidence to support a finding that there was insufficient lighting in the 'tween deck area. See *Mosley* v. *Cia. Mar. Adra, S.A.*, 314 F. 2d 223, 227-28 (2d Cir.), cert. denied, 375 U. S. 829 (1963).

Defendant contends that portable lighting equipment was available to the longshoremen on request. There is testimony that such equipment was in the storehouse of the ship, but there is no showing that it was available for this area on the date in question. Nor was evidence produced concerning the adequacy and condition of electrical

outlets. Indeed, Foreman Brown, who was in charge of loading, testified that his general request for lighting equipment was not acted upon.

In *Mahnich* v. *Southern S.S. Co.*, 321 U.S. 96, 103-04 (1944) the Supreme Court said:

> "Nor does the fact that there was sound rope on board, which might have been used to rig a safe staging, afford an excuse to the owner for the failure to provide a safe one . . . the owner must provide the seaman with seaworthy appliances with which to do his work, . . . *safe appliances* [*must*] *be furnished when and where the work is to be done.*" (Emphasis added.)

Unseaworthiness is not "excused because proper equipment was available but went unused." *Skibinski* v. *Waterman S.S. Corp.*, —— F. 2d ——. (2d Cir. March 31, 1966).

"[T]he owner warrants to longshoremen . . . a safe place in which to handle cargo." *Carabellese* v. *Naviera Asnar, S.A.*, 285 F. 2d 355, 359-60 (2d Cir. 1960), cert. denied, 365 U. S. 872 (1951). There was ample evidence to support the jury's finding that the place where Mosley was assigned to work was unsafe.

Defendant also argues that the district court "submitted the case to the jury on issues other than those defined and limited by the pre-trial order." The pre-trial order simply indicated that "all the issues of fact and law to be raised at the second trial of this action have previously been raised at the first."

Mosley's proof involved substantially the same factors on both trials. To the extent that there was any variation, the district court properly modified the pre-trial order pursuant to Rule 14, of the Calendar Rules of the United States District Court for the Southern District of New York.

A.

There is nothing in the charge of the district court concerning the hook used by Mosley that conflicts with this court's opinion in *Mosley* v. *Cia. Mar. Adra, S.A., supra.*

II.

The jury returned a verdict in favor of the stevedore company, in the third party action brought by the shipowner for indemnity. The district court set aside the verdict and granted judgment n.o.v. to the shipowner.

The stevedore company claims that Cia. Mar. Adra did not move for a directed verdict on the third party complaint and therefore could not properly make an n.o.v. motion. See 5 Moore, *Federal Practice* ¶50.08 (2d ed. 1964).

At the conclusion of all the evidence, Lipsett Steel sought dismissal of the third party complaint:

> "on the ground that there is no proof that the third-party defendant failed to perform its contract properly. * * *"

Cia. Mar. Adra's counsel stated:

> "Your Honor, the defendant renews its motion to dismiss the complaint and for a directed verdict on the ground that the evidence *is insufficient on which to go to the jury on any of these issues that have been raised in this case.*" (Emphasis added.)

This motion, although somewhat ambiguous, preserved Cia. Mar. Adra's right to make an n.o.v. motion.

The requirement of Rule 50(b) of the Federal Rules of Civil Procedure,* that a directed verdict motion must pre-

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* Rule 50(b) of the Federal Rules of Civil Procedure reads in relevant part:

"(b) MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT. Whenever a motion for a directed verdict made at the close of

cede an n.o.v. motion is harsh in any circumstances. Especially where, as here, three parties are involved, where the attention of the defendant's counsel is focused on the plaintiff, his primary adversary, and where there are the complications which must attend a trial of this type, a motion such as that made by counsel should not be read narrowly, so as to penalize the client but rather should be read in light of the purpose of the Federal Rules to "secure the just, speedy and inexpensive determination of every action."

Cia. Mar. Adra in a memorandum in support of its n.o.v. motion expressly pointed out to the district court that a motion for a directed verdict had been made. Lipsett Steel in its memorandum of opposition did not dispute this claim. The fact that Lipsett Steel did not take exception to the n.o.v. motion suggests that Cia. Mar. Adra's directed verdict motion was accepted as covering the indemnity issue.

On the merits of the n.o.v. motion, the trial judge ruled that "any seaworthy condition obtaining in the 'tween deck area was created by the stevedore . . ." A stevedore company is liable for indemnity if it creates an unseaworthy condition, or if it fails to eliminate a known risk created by another. See *Mortensen* v. *A/S Glittre*, 348 F. 2d 383, 385 (2d Cir. 1965). Since Lipsett furnished and rigged

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all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than 10 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict."

the chute, and controlled all other relevant aspects of the loading, the jury would have to find that the stevedore company was liable for a breach of its warranty of workmanlike service. See, e.g., *Italia Societa* v. *Oregon Stevedoring Co.*, 376 U. S. 315, 318-24 (1964); *Crumady* v. *The J. H. Fisser*, 358 U. S. 423, 428-29 (1950); *Ryan Stevedoring Co.* v. *Pan-Atlantic S.S. Corp.*, 350 U. S. 124, 133-34 (1956).

Affirmed.

FRIENDLY, *Circuit Judge* (dissenting):

Deeply regretting the necessity, I see no alternative to sending this case back for a third trial in which, hopefully, the jury may be given a proper charge. Despite views last expressed in *Skibinski* v. *Waterman S.S. Corp.*, —— F. 2d ——, —— (1966) (dissenting opinion), slip opinions 1397, 1404, I agree that Mosley was entitled to go to the jury on the issue of inadequate lighting; although the cases generally cited to this point concerned failure to supply lighting at night, *Mollica* v. *Compania Sud-Americana de Vapores*, 202 F. 8d 25, 27 (2 Cir.), cert. denied, 345 U. S. 965 (1953); *Ross* v. *S.S. Zeeland*, 240 F. 2d 820, 822-23 (4 Cir. 1957), the jury could properly have found that the stevedores had created on October 14 a condition of permanent night in the 'tween deck of the #5 hatch. Cf. *Robillard* v. *A. L. Burbank & Co.*, 186 F. Supp. 193 (S. D. N. Y. 1960). Whether the form of the chute afforded any basis for a finding of unseaworthiness is decidedly questionable; we have been pointed to no evidence that its configuration departed from the norm, and the tapering must have served a useful purpose in decelerating the falling scrap. However, the jury was permitted to find unseaworthiness not only on these accounts but on the basis of "the type of operation that was going on" and "the

condition of the deck"—activities and results being currently created by Mosley's employer, Lipsett, in the work it was hired to perform. Metal scrap can hardly be loaded so as to leave a 'tween deck entirely spick and span; if Lipsett exceeded permissible limits of messiness, this went to its negligence but not to the seaworthiness of the ship. Cf. *Morales* v. *City of Galveston*, 370 U. S. 165 (1962). In granting the ship's motion for judgment n.o.v. against Lipsett, the judge recognized that the absence of lighting might be "the only unseaworthiness," yet his instruction permitted the jury to find against the ship not only on that permissible ground but on impermissible ones. The same rule of law applied in our prior decision requires a new trial.

B.

MEMORANDUM

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

Civ. No. 127-204

SAMUEL MOSLEY,

Plaintiff,

against

CIA. MAR. ADRA S.A.,

Defendant and
Third-Party Plaintiff,

against

LIPSETT STEEL PRODUCTS, INC.,

Third-Party Defendant.

MACMAHON, *District Judge.*

Plaintiff, a longshoreman employed by third-party defendant, was injured while loading scrap metal in a tween deck area of defendant's vessel. The jury, on a theory of unseaworthiness, returned a verdict in favor of plaintiff, but refused to award indemnity to the ship in its action over against the stevedore. Defendant now moves under Rule 50(b) of the Federal Rules of Civil Procedure for judgments n.o.v. against both plaintiff and third-party defendant, or, alternatively, for new trials. With regard to the main action, it contends that the vessel was seaworthy as a matter of law and that the award of $125,000.00 was

unreasonably excessive; and with regard to the suit for indemnity, that the stevedore was liable over to it as a matter of law.

Taking these contentions one at a time, we have no doubt that the issue of seaworthiness was properly submitted to the jury and that the jury could reasonably have found that the tween deck area was not a reasonably safe place for plaintiff to perform his assigned task of removing obstructions from the chute in order to continue stowing the scrap cargo as directed. The jury could find from uncontradicted evidence that, on the occasion in question, plaintiff approached the chute over a deck littered with scrap, tried to secure an adequate footing but due to darkness could not see whether the scrap on which he was standing was firm or loose, reached upward and forward with an improvised hook, started to pull on a piece of scrap lodged in the narrow end of a tapered chute, and fell backwards when his footing gave way. We think the jury could reasonably have found that the lighting was so poor as to constitute an unseaworthy condition and the proximate cause of plaintiff's injuries. There was ample evidence that the daylight was all but blocked out of the hold by intense dust, the large intruding chute, the overhead magnet, and the high pile of scrap pyramided almost to the bottom of the coaming which framed the square of the hatch. Artificial lighting was available but not provided. The jury could also have reasonably found that the chute was tapered too narrw at the bottom for the size of some of the pieces of scrap and therefore unfit for its intended purpose; that the deck was so cluttered that it was a hazardous floor for the task assigned to plaintiff; that the primary method of clearing the chute was itself unsafe; or that any of these factors—the darkness, the chute, the size of the lodged piece of scrap, the littered deck, the

method of clearing the chute—operated in combination, *Kray* v. *United States*, 123 F. 2d 1008, 1010 (2d Cir. 1941), to create an unseaworthy condition.

Nor is the verdict excessive as a matter of law. There was evidence adduced that at the time of his injury plaintiff was earning between six and seven thousand dollars a year; that he could reasonably have expected to continue working as a longshoreman for nineteen years, with wage rates on the rise; and that as a result of his injury he is permanently disabled from performing the kind of heavy labor by which he has always earned his living. There was further evidence that his education is slight. This, combined with the fact that plaintiff is a Negro, substantially reduces his opportunity to mitigate damages in the fields left open to him. In addition, there was voluminous evidence of pain and suffering, past, present, and future. Plaintiff appeared to have unfeigned difficulty walking to and from the stand, a fact which the jury could surely consider. In short, while the award is high, it cannot be said to be unreasonably excessive.

Defendent's third contention is that it is entitled to indemnity as a matter of law. With this contention, we wholly agree. The law is clear that a stevedore is liable over if he himself created the unseaworthy condition, or if the performance of a workmanlike job called for the elimination of a known risk created by another. *Mortensen* v. *A/B Glittre*, 348 F. 2d 383, 385 (2d Cir. 1965); *Albanese* v. *M. V. Nedorl, Amerik Stoomv, Maata.*, 346 F. 2d 481, 484 (2d Cir.), *rev'd on other grounds*, 34 U.S.L. Week 3217 (Dec. 13, 1965). Here, there is no question but that any unseaworthy condition obtaining in the tween deck area was created by the stevedore and that the verdict in its favor is against the weight of the evidence. Even if we assume that the absence of lighting was the only unsea-

worthiness and that this condition was in its inception wholly attributable to the owner's failure to provide internal lights, the stevedore could and should have corrected it. There was uncontradicted evidence that electrical outlets were installed in the hold where plaintiff was working and that, in another hold on an earlier day, the stevedore had made use of such an outlet to provide artificial illumination. In this regard, plaintiff's knowledge of inadequate lighting is imputable to his employer, third-party defendant. *Mortensen* v. *A/B Glittre, supra* at 385.

Accordingly, defendant's motion for judgment n.o.v. against plaintiff is denied, and the Clerk is directed to enter judgment for plaintiff in accordance with the jury's verdict. Defendant's motion for judgment n.o.v. against third-party defendant is, however, granted, and the Clerk is directed to enter judgment for defendant against third-party defendant. The jury's verdict for third-party defendant is hereby set aside. Defendant's alternative motions for new trials are in all respects denied.

So ordered.

Dated: New York, N. Y.
January 27, 1966

LLOYD F. MACMAHON
United States District Judge

C.

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the sixteenth day of June one thousand nine hundred and sixty-six.

Present:

HON. HENRY J. FRIENDLY,
HON. PAUL R. HAYS,
HON. WILFRED FEINBERG,

Circuit Judges.

SAMUEL MOSLEY,

Plaintiff-Appellee,

v.

CIA. MAR. ADRA S.A.,

Defendant and Third-Party Plaintiff-Appellant-Appellee,

LIPSETT STEEL PRODUCTS, INC.,

Third-Party Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

C.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed with costs to the plaintiff-appellee, Samuel Mosley, and to third party plaintiff-appellee Cia. Mar. Adra S.A.

Daniel

A. [redacted] FUSARO
Clerk

D.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

SAMUEL MOSLEY,

Plaintiff,

v.

CIA. MAR. ADRA S.A.,

Defendant and Third-Party Plaintiff-Appellee,

v.

LIPSETT STEEL PRODUCTS, INC.,

Third-Party Defendant-Appellant.

PETITION FOR REHEARING

Purdy, Lamb & Catoggio, New York, N. Y., for third-party defendant-appellant.

Petition for rehearing by the panel denied.

H. J. F.
P. R. H.
W. F.
U.S.C.JJ.

Jul 22 1966

E.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

SAMUEL MOSLEY,

Plaintiff,

v.

CIA. MAR. ADRA S.A.,

Defendant and Third-Party Plaintiff-Appellee,

v.

LIPSETT STEEL PRODUCTS, INC.,

Third-Party Defendant-Appellant.

PETITION FOR REHEARING IN BANC

Purdy, Lamb & Catoggio, New York, N. Y., for third-party defendant-appellant.

No active circuit judge having requested that the case be reheard in banc, the petition is denied.

J. EDWARD LUMBARD,
Chief Judge

22 July 1966